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No. 89-1580

Supreme Court, U.S.
FILED
JUN 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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June 21, 1990

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QUESTION PRESENTED

Did the Court of Special Appeals of Maryland correctly determine that a juror's driving by the crime scene during trial did not warrant Sherman's being granted a new trial?

PARTIES

The caption contains the names of all the parties below.

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STATE OF MARYLAND,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Respondent, the State of Maryland, respectfully requests that this Court decline to issue a writ of certiorari to review the judgment and unreported opinion of the Court of Special Appeals of Maryland.

OPINION BELOW

The unreported per curiam opinion of the Court of Special Appeals of Maryland is reprinted in the Appendix to the Petition.

STATEMENT OF JURISDICTION

The unreported opinion of the Court of Special Appeals of Maryland affirming Petitioner Timothy Scott Sherman's convictions was filed on May 16,

1989. Sherman filed a timely petition for writ of certiorari in the Court of Appeals of Maryland, and Maryland's highest appellate court denied the petition on October 20, 1989. Sherman then filed a petition for reconsideration of denial of petition for certiorari. The petition was denied by the Court of Appeals on January 10, 1990.

Sherman has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

As explained more fully *infra*, a petition or motion for reconsideration of the denial of a petition for writ of certiorari is not recognized by the Maryland Rules of Procedure. Consequently, the time for filing a petition for writ of certiorari in this Court began to run from October 20, 1989, the date when the Court of Appeals of Maryland refused to exercise its discretionary power of review. Under this Court's former Rule 20.1, Sherman was required to file his petition for writ of certiorari within 60 days after October 20, 1989. Because Sherman's petition was filed on April 10, 1990, and not on or before December 19, 1989, the petition was untimely filed.

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

United States Constitution, Amendments VI and XIV are set forth in the Petition at 3.

Maryland Rule 8-604 provides in pertinent part:

> (a) Generally.—As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:
>
> (1) dismiss the appeal pursuant to Rule 8-602;

(2) affirm the judgment;

(3) vacate or reverse the judgment;

(4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

Maryland Rule 8-605 provides in pertinent part:

(a) Motion; Response; No Oral Argument.—Except as otherwise provided in Rule 8-602(c), a party may file pursuant to this Rule a motion for reconsideration of a decision by the Court that disposes of the appeal. The motion shall be filed (1) before issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is earlier. A response to a motion for reconsideration may not be filed unless requested on behalf of the Court by at least one judge who concurred in the opinion or order. Except to make changes in the opinion that do not change the decision in the case, the Court ordinarily will not grant a motion for reconsideration unless it has requested a response. There shall be no oral argument on the motion.

* * *

(d) Disposition of Motion.—A motion for reconsideration shall be granted only with the consent of at least half the judges who con-

curred in the opinion. If a motion for reconsideration is granted, the Court may make a final disposition of the appeal without reargument, restore the appeal to the calendar for argument, or make other orders, including modification or clarification of its opinion, as the Court finds appropriate.

Maryland Rule 8-606 provides in pertinent part:

(a) To Evidence Order of the Court.—Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.

STATEMENT OF THE CASE

At approximately 1:45 a.m. on Monday, October 12, 1987, deputies from the Harford County Sheriff's Department began arriving at the home of Stevenson, Ann, and Timothy Sherman. (Tr. 5/24/88, at 92). They found Stevenson and Ann Sherman lying dead in their bed; each had been killed by a shotgun. (Tr. 5/24/88, at 94; Tr. 5/25/88, at 7-18). In the hallway outside the victims' bedroom lay two expired Remington 12-gauge shotgun shells. (Tr. 5/24/88, at 93; Tr. 5/27/88, at 59). There were no signs of a forced entry or theft. (Tr. 5/24/88, at 71-76; Tr. 5/26/88, at 49-52). Although the doors and windows of the house were alarmed, the alarm switch in the house was in the "off" position. (Tr. 5/31/88, at 42-44).

Petitioner Timothy Scott Sherman, who, with his grandfather William Gibson, was at the crime scene when the deputies began to arrive, reported "that he

had no idea who it was that killed his Mom and Dad, but whoever it was, that his Dad was shot first and then he heard his Mom scream, and then they shot his Mom." (Tr. 5/24/88, at 93-94, 141). Sherman also reported that he was in bed when the shootings occurred and that, afterward, he dressed and ran to Gibson's house. (Tr. 5/24/88, at 94).

While his hands were being tested for gunshot primer residue, Sherman explained that he had been hunting the previous Saturday and had been reloading shells on Sunday afternoon. (Tr. 5/26/88, at 19). He also remarked and demonstrated that, when he fired a shotgun, he pulled the trigger with his middle finger and placed his index finger on the metal plate above the trigger guard. (Tr. 5/26/88, at 20-21).

Officers at the scene recovered a box of Remington 12-gauge shotgun shells from under the mattress of Timothy Sherman's bed. (Tr. 5/26/88, at 61-63; Tr. 5/31/88, at 52). The box, which was designed to hold five shotgun shells, contained three shells that matched the two expended shells found outside the victims' bedroom. (Tr. 5/25/88, at 80; Tr. 5/26/88, at 62; Tr. 5/27/88, at 63-64). During the morning of October 12, Sherman told Lieutenant James Isennock that he had purchased a box of shells on the day before and had fired his gun two times. (Tr. 5/25/88, at 39-41).

Hidden in a pine tree beside Gibson's house, deputies found a Stevens 12-gauge shotgun that belonged to the Shermans. (Tr. 5/24/88, at 53-58). The F.B.I.'s examination of this weapon disclosed that it had fired the two shells found in the hallway of the Shermans' home and that fingerprints on the weapon were those of Timothy Sherman. (Tr. 5/27/88, at 63;

Tr. 5/31/88, at 12-13). One of those prints was located above the trigger assembly. (Tr. 5/31/88, at 13).

By indictment filed in November, 1987, Sherman was charged with murdering his parents. (R. 6-8). Following a lengthy jury trial in the Circuit Court for Harford County, Maryland, Sherman was convicted of two counts of first degree murder. (Tr. 6/7/88, at 3-7). After the jury foreman's statement of the verdict was taken, each member of the jury was individually polled and each juror stated that Sherman was guilty of the first degree murder of Ann and Stevenson Sherman. (Tr. 6/7/88, at 3-7).

On September 2, 1988, the trial court heard argument and testimony in connection with Sherman's motion for new trial. (Tr. 9/2/88, at 3-70). Sherman had filed a new trial motion on June 16, 1988, in which he had alleged, *inter alia*, "[t]hat the jurors committed misconduct during the trial and deliberations." (R. 183-84). Despite this allegation, the defense did not learn, until the morning of September 2, that juror Blane Howard Miller Jr. had visited the scene during trial. (Cert. Pet. filed in Ct. App. of Md. at 8). Likewise, the State did not learn about Miller's visit until the morning of September 2, even though the State had interviewed Miller several days earlier in connection with another incident that formed a ground for Sherman's new trial motion. (Tr. 9/2/88, at 17-18).[1]

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[1] Most of the testimony at the new trial hearing, including that of Miller, focused on whether the trial judge had had an *ex parte* communication with the jury after deliberations had begun. That issue is currently the subject of a State post-conviction proceeding.

At the hearing on September 2, Miller testified that, "two or three days into the case," he and his wife drove to the scene of the killings after the jury had been dismissed for the evening. (Tr. 9/2/88, at 16). In describing where he had gone, Miller stated: "I went to the Sherman house and then I drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." (Tr. 9/2/88, at 16). Miller confirmed that he had seen both the house and the tree. (Tr. 9/2/88, at 16-17). During cross-examination, Miller acknowledged that he had visited the scene after having viewed a videotape of the outside of the Sherman house and pictures of the tree. (Tr. 9/2/88, at 25-26). Miller could not remember if his visit occurred after aerial and other photographs of the scene had been shown to the jury. (Tr. 9/2/88, at 25-26). He explained again that "the reason why I went there was so I could see the tree that was so much in question." (Tr. 9/2/88, at 26).

Following argument of counsel, during which the defense alluded generally to Sherman's Sixth Amendment rights and in particular to Sherman's Sixth Amendment right to a fair trial, (Tr. 9/2/88, at 48-62; *id.* at 56-60), the trial court stated, in part, "that I think that [Miller's] activity is not of such magnitude as to warrant a new trial or reversible appeal." (Tr. 9/2/88, at 64).[2] After also rejecting Sherman's other grounds for a new trial, the trial court sentenced Sherman to two consecutive terms of life imprisonment. (Tr. 9/2/88, at 157).

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[2] The full text of the trial court's ruling regarding Miller's visit to the scene is reproduced in the Petition at 18-19.

On appeal to the Court of Special Appeals of Maryland, Sherman attacked the trial court's failure to grant a new trial on account of Miller's crime scene visit. In the heading to his written argument, Sherman complained that "the trial court committed reversible error by violating the appellant's constitutional rights of due process in a fair and impartial trial by not granting the appellant's motion for a new trial." (Appellant's Brief at 25). In the text of his brief, Sherman claimed that Miller's conduct violated the juror's oath and the court's instructions regarding the evidence to be considered and sequestration. (Appellant's Brief at 26). Sherman suggested that it was an abuse of discretion for the trial court to have denied his motion for new trial, and that Miller's site visit could not be deemed harmless error. (Appellant's Brief at 26-27). The Court of Special Appeals rejected Sherman's contentions in an unreported opinion, saying:

> Sherman argues that the trial court should have granted a new trial because a juror and his wife drove to the neighborhood of the murder scene.
>
> When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice from the fact of extraneous matter in relation to the circumstances of the particular case." Wernsing v. General Motors Corp., 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to

> the defendant in order to discern whether a new trial is justified. Wernsing at 420.
>
> The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. Eades v. State, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.
>
> Sherman next alleges that there was a violation of the sequestration order because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case.

(Pet. App. 15a-17a).

In the petition for writ of certiorari that he filed in the Court of Appeals of Maryland, Sherman, without citation to either the Sixth or Fourteenth Amendments to the United States Constitution and with but one reference to a denial of an impartial jury, challenged the unreported decision of Maryland's intermediate appellate court on the issue of juror Miller's visit to the crime scene. (Cert. Pet. filed in Ct. App. of Md. at 8-10). The Court of Appeals of Maryland denied Sherman's petition on October 20, 1989. (Pet. App. 24a-25a). Thirty days later, Sherman filed a petition for reconsideration of denial of petition for certiorari. In this petition, Sherman claimed that Mill-

er's conduct deprived him "of his right to trial by an impartial jury, his right to confront the witnesses against him, his right to a fair trial, and his right to the assistance of counsel." (Pet. for Reconsideration at 19). This petition was denied on January 10, 1990. (Pet. App. 26a).

REASONS FOR DENYING THE WRIT

Sherman's petition for a writ of certiorari to review the judgment and unreported decision of Maryland's intermediate appellate court should be denied for any one of four reasons. Not only has Sherman failed to file his petition within the time requirements of this Court's procedural rules, his petition raises issues that were not raised or decided by the Court of Special Appeals of Maryland. Additionally, the *per se* rule of law that Sherman proposes as a standard for review is in conflict with relevant decisions of this Court. And, Sherman's alternative suggestion that the Court of Special Appeals required him to show actual prejudice is incorrect; the Court of Special Appeals correctly decided that Sherman was not entitled to a new trial. Accordingly, notwithstanding conflicts in the law on the subject of unauthorized crime scene visits by jurors, Sherman is not entitled to the relief that he claims has been erroneously withheld by the Maryland courts.

1. The petition for writ of certiorari is untimely.

The Court of Appeals of Maryland denied Sherman's petition for writ of certiorari on October 20, 1989. As of that date, former Rule 20 of this Court's Rules of Procedure was in effect. Paragraph .1 of that rule provided in relevant part that "[a] petition for writ of certiorari to review the judgment in a

criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." Under former Rule 20.1, then, the time for filing Sherman's petition began to run from the date the Court of Appeals denied discretionary review, and the time expired on December 19, 1989. *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (where highest state court has discretion to review, but declines to do so, time for filing runs from date of refusal to review).[3]

Given that Sherman did not file his petition for writ of certiorari until April 10, 1990, he is apparently relying upon this Court's current Rule 13, paragraphs .1 and .4, and the fact that he filed, in the Court of Appeals, a petition for reconsideration of denial of petition for certiorari. The petition for reconsideration was denied by the Court of Appeals on January 10, 1990.

Rule 13.4, like former Rule 20.4, states in relevant part that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Assuming, without conceding, that a petition for reconsideration is otherwise a petition for rehearing

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[3] Current Rule 13.1 of this Court's Rules of Procedure seems to codify the language of the *Levee* case by providing in relevant part that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review."

within the meaning of Rule 13.4, the filing of Sherman's petition for reconsideration should not be viewed as extending the time for filing the instant petition for writ of certiorari.

Rule 8-605 of the Maryland Rules of Procedure does not expressly permit or preclude the filing of a motion for reconsideration of a denial of a petition for writ of certiorari. Rule 8-605 is, however, derived in part from a former rule that did expressly preclude a motion for reconsideration of a decision denying certiorari.[4] When new Rule 8-605 is read together with Rule 8-604, which addresses the subject of disposition, and Rule 8-606, which deals with the subject of mandates, there is no reason to conclude that new Rule 8-605 has effected a change in the previous Maryland practice of not permitting parties to seek reconsideration of the decision to deny certiorari.

Rule 8-605(a) speaks in terms of "a decision by the Court that disposes of the appeal." Rule 8-604(a) outlines the ways in which the Maryland appellate courts

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[4] Former Maryland Rule 850, which governed reconsideration of decisions of the Court of Appeals of Maryland, provided in pertinent part in subsection (a) that "[a] motion for reconsideration of a decision other than one granting or denying certiorari, specifying the grounds therefor, may be filed within thirty days after the opinion of this Court has been filed." Effective July 1, 1988, Rule 850 was rescinded, as were all Maryland Rules of Procedure pertaining to the Maryland Court of Appeals and the Court of Special Appeals. Like many of the new rules regarding procedure in the Maryland appellate courts, current Rule 8-605 governs reconsideration of decisions of both the Court of Appeals and the Court of Special Appeals, without distinguishing between the two appellate courts, and it replaces former rules that addressed the same subject matter, but which pertained to each appellate court individually.

"shall dispose of an appeal." Denial of a petition for writ of certiorari is not one of the six enumerated ways of disposing of an appeal. Rule 8-606(a), in turn, states that "[a]ny disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court." No mandate of the Court of Appeals is issued when that court denies a petition for writ of certiorari.

Because Maryland procedure does not contemplate a motion for reconsideration of a denial of certiorari, Sherman's petition for reconsideration and the order denying same should not be viewed as extending the time in which Sherman was required, under former Rule 20.1, to file his petition for writ of certiorari. Although the State recognizes that this Court may waive the untimely filing of a petition in a criminal case, *Schacht v. United States*, 398 U.S. 58, 63-64 (1970), there are no compelling reasons to countenance the untimely filing in the instant case. The Court should, therefore, decline to issue the requested writ of certiorari because Sherman's petition was untimely filed.

2. The petition raises issues that were not raised or decided in the Court of Special Appeals.

On page 22 of his petition in this Court, Sherman asserts: "Although the courts below did not even acknowledge that Miller's site visit amounted to a deprivation of Timmy Sherman's federal constitutional rights, in fact there can be no doubt that such an escapade violates the defendant's federal rights of confrontation, cross-examination, assistance of counsel, trial by an impartial jury, and due process."

To the extent that the lower courts failed to acknowledge the constitutional deprivations alleged in Sherman's petition, the omissions are directly attributable to Sherman's failure to raise such claims in the courts below.

In the trial court, although Sherman referred generally to his Sixth Amendment rights in several instances, in only one instance did Sherman elucidate what Sixth Amendment rights had been implicated. (Tr. 9/2/88, at 56-60). In that single instance, Sherman claimed that his "Sixth Amendment right to a fair trial" had been violated. (Tr. 9/2/88, at 57).

On appeal to the Court of Special Appeals of Maryland, Sherman was even more cryptic than he had been in the trial court. In his brief's argument heading relating to Miller's visit, Sherman suggested that "the trial court committed reversible error by violating the appellant's constitutional rights of due process in a fair and impartial trial." (Appellant's Brief at 25). Sherman's substantive argument spoke of Miller's conduct as having violated the juror's oath, the court's instructions, and the court's sequestration orders. (Appellant's Brief at 26). Sherman also argued about adverse prejudice to the defendant, an abuse of discretion in the denial of the new trial motion, and the inability of the State to prove harmless error. (Appellant's Brief at 27). At no time did Sherman allege the constitutional violations catalogued on page 22 of his instant petition. (Appellant's Brief at 25-28).

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970), this Court declined to consider an issue of trial court error that was raised in Adickes's petition for certiorari, but which had not been raised in or ruled on by the Court of Appeals. Here, where

Sherman claims violations of constitutional rights, *e.g.*, confrontation, cross-examination, assistance of counsel, that were never brought to the attention of the court whose judgment would form the basis of review, this Court should decline to grant the over-inclusive petition for certiorari.

3. The proposed standard of automatic reversal conflicts with decisions of this Court.

Sherman's first contention for why this Court should issue a writ of certiorari is that the Court of Special Appeals' decision conflicts with the decisions of several state courts of last resort. (Pet. at 26-35). In this regard, Sherman suggests that, as have some lower courts, "[t]his Court should adopt, as a matter of federal constitutional law, the rule that an unauthorized visit by a juror to a crime scene whose physical description is in issue automatically mandates reversal." (Pet. at 34-35).

The fallacy of Sherman's contention, and that which militates against review by this Court, is that decisions of this Court involving analogous situations suggest that a *per se* rule of reversal is not constitutionally mandated. *See Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (although an attempt to bribe a juror is presumptively prejudicial, "the presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant").

Accordingly, even if the unreported decision of the Court of Special Appeals, which decision "is neither precedent within the rule of stare decisis nor persuasive authority," Md. Rule 8-114(a),[5] can be said to conflict with the decisions of other state courts, the rule of law espoused by these other courts is inconsistent with decisions of this Court. Accordingly, the perceived conflict in state court decisions does not provide an appropriate basis for granting Sherman's petition for writ of certiorari.

4. The Court of Special Appeals correctly resolved the issues before it.

In his second argument for why this Court should grant his petition for certiorari, Sherman challenges the standard by which the Court of Special Appeals analyzed his contentions in that court, saying that it conflicts with the standards applied by other lower

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[5] Maryland Rule 8-114 provides in full as follows:

> (a) Not Authority.—An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.
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> (b) Citation.—An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

courts. (Pet. at 35-53). For example, on page 36 of his petition, Sherman argues as follows: "Constitutional error was indisputably shown in this case, yet the burden was placed on the defendant to show prejudice from the error, not on the State to rebut it." Although a conflict regarding standards may exist, Sherman is mistaken in his contention that the Court of Special Appeals incorrectly resolved the issues before it.

A fair reading of the Court of Special Appeals' decision suggests that the first three paragraphs of the opinion address the contention that Miller's site visit deprived Sherman of a fair trial. The last paragraph of the opinion deals with the separate issue of whether Miller's visit to the scene with his wife violated the trial court's sequestration order. Only with respect to this latter issue, which is not a subject of Sherman's petition in this Court and which in any event is a matter best left to state courts to resolve,[6] did the Court of Special Appeals impose upon Sherman the burden of showing prejudice.

Although its decision as it relates to Sherman's fair trial contention is terse, the Court of Special Appeals' citation to *Eades v. State*, 75 Md. App. 411, 541 A.2d 1001, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988), demonstrates that the court properly analyzed, albeit implicitly, the issue before it. In the *Eades* case, which was decided less than a year before Sherman's case,

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[6] It is the long-standing policy of this Court to accord great deference to a state's establishment and implementation of criminal trial procedures. *E.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973).

the Court of Special Appeals had engaged in a comprehensive review of the law pertaining to juror misconduct and extraneous influences on the jury. *Id.* at 416-25, 541 A.2d at 1004-08. In recognizing that a motion for a new trial is committed to the sound discretion of the trial judge, the Court of Special Appeals also acknowledged that, where misconduct is at issue,

> the trial judge must account for the fact that due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

Id. at 420, 541 A.2d at 1006 (quoting *Smith v. Phillips*, 455 U.S. at 217). The intermediate appellate court also acknowledged that "a motion for mistrial or a new trial because of alleged jury misconduct will be granted if the misconduct was such as to indicate that a fair and impartial trial could not be had under the circumstances." *Id.*, 541 A.2d at 1006. All of the above-quoted language appears on the pages of the *Eades* opinion that the court refers to in its decision in the instant case. (Pet. App. 16a).

In *Eades*, the Court of Special Appeals went on to discuss various standards that have been used by different courts to determine whether prejudice has resulted when an irregularity has occurred.[7] It

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[7] In *Eades*, one of the jurors had asked her lawyer-husband why it was that the judge had said that a witness could say what she had. The husband had explained that the witness's statement was a spontaneous utterance. 75 Md. App. at 415, 541 A.2d at 1003-04.

ultimately chose to "assume that the Supreme Court's holding in *Remmer* as to the presumptively prejudicial effect of any private communication with a juror concerning a matter pending before the jury remains the law." 75 Md. App. at 423, 541 A.2d at 1008. In a subsequent discussion regarding which party bears the burden when the problem of improper juror contact is raised, the court again assumed that it is the State that bears the burden of establishing the harmlessness of the contact beyond a reasonable doubt. *Id.* at 425-26 n. 4, 541 A.2d at 1008-09 n. 4.

Although the Court of Special Appeals did not, in its decision of the instant case, expressly refer to the standards it had applied in the *Eades* case, it is reasonable to believe that the court was aware of these standards and that it considered them in conjunction with the language regarding "the degree of probable prejudice" that it quoted from Maryland's high court's decision in *Wernsing v. General Motors Corp.*, 298 Md. 406, 419-20, 470 A.2d 802, 809 (1984). Consequently, it is *not* reasonable to believe, as Sherman suggests in his petition, that the Court of Special Appeals imposed a burden upon him to prove that he had been prejudiced. Indeed, the Court of Special Appeals' reliance upon *Eades* and *Wernsing* suggests that the court affirmed the trial court's denial of Sherman's new trial motion only after it was persuaded that the State had established that probable prejudice to Sherman had not occurred beyond a reasonable doubt. Such a standard is not significantly different from the alternate standard proposed by Sherman. Furthermore, assuming that such a standard is to be applied, despite language in *Smith v. Phillips* that suggests that a less stringent standard

is appropriate, 455 U.S. at 215, the record before the Court of Special Appeals reveals that the court's resolution of the issues before it was correct.

As both the trial court and the Court of Special Appeals recognized, the view of the scene was cumulative of evidence introduced at trial. (Tr. 9/2/88, at 63-64; Pet. App. 16a). Given Miller's description of what he did during the site visit, there is nothing to suggest that Miller did more than drive by the house and the tree. There is also nothing to suggest that Miller considered or discussed his observations during deliberations.[8]

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[8] At various points in his petition, Sherman refers to his not being permitted to adduce certain testimony from Miller. (*E.g.*, Pet. at 16 & nn. 3 & 4; 47-48 n. 14; 49). To the extent that Sherman is suggesting error in this regard, his contention is without merit.

First, although the State consistently maintained in the State courts that Miller should not have been permitted to testify about his conduct, both the trial court and the Court of Special Appeals considered the substance of Miller's evidence.

Second, although the State also objected, at the new trial hearing, to allowing the defense to ask Miller why he went to the scene, on direct examination Miller explained that he was "looking for a tree that was so involved in the case," and on cross-examination Miller said he had gone to the scene "so I could see the tree that was so much in question." (Tr. 9/2/88, at 16, 26). And, when the State objected to the defense's asking Miller if what he had seen had influenced his deliberations, defense counsel withdrew his question. (Tr. 9/2/88, at 17-18).

Finally, under Maryland law, "the question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been." *Mack v. State*, 300

In sum, when the Court of Special Appeals' decision is viewed in the context of the cases that the court relied upon and the facts before it, Sherman's criticisms of the decision necessarily dissipate, and the reasons for granting certiorari disappear. Accordingly, this Court should decline to grant the petition for writ of certiorari for the additional reason that the Court of Special Appeals correctly affirmed the trial court's decision to deny Sherman a new trial.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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June 21, 1990

Md. 583, 603, 479 A.2d 1344, 1354 (1984). No proffers were made as to any further reasons Miller had for going to the scene or as to whether Miller, alone or with other jurors, considered his site visit during deliberations.